No. 86 2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWARD C. MACKIE,
PATRICK G. CULLEN,
ROLLINS, SMALKIN, RICHARDS & MACKIE,
401 North Charles Street,
Baltimore, Maryland 21201,
(301) 727-2443,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Whether the United States of America, notwithstanding *Lockheed Aircraft Corporation v. United States*, 460 U.S. 190 (1983), is immune from suit for indemnity or contribution to a co-tortfeasor held liable for injury to employees of the government.

2. Whether the immunity recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), protects the individually named respondents — federal employees sued in their individual capacities — from liability under state tort law for injuries allegedly caused by their acts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Andrew W. Klassett, Philip H. Welty, Jr., Thomas G. Vegella, John Anthony Vilgos, and Raymond Mullinix were Defendants in the District Court proceeding and are Respondents here.

RULE 28.1

CORPORATE STATEMENT

The General Electric Company has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held. These are:

General Electric Credit Corporation
General Electric Credit International, N.V.
Canadian General Electric Company, Ltd.
General Electric Overseas Capital Corporation
RCA Corporation

The public holdings of General Electric Credit Corporation, General Electric Credit International, N.V., General Electric Overseas Capital Corporation and RCA Corporation are limited to debt securities. Canadian General Electric Company, Ltd. has both debt securities and equity securities (common stock) which are publicly held.

General Electric Company itself has common stock and debt securities which are publicly traded.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

General Electric Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (A-1) is reported at 813 F.2d 1273. The

Opinion of the United States District Court for the District of Maryland (A-16) is reported in part at 603 F. Supp. 881.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 12, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THIS CASE

Title 28, Section 2674, of the United States Code provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Annotated Code of Maryland, Article 101, Sections 15, 21, 31, and 67 are set out in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner General Electric Company has sued the United States under the Federal Tort Claims Act, and the individual Respondents herein, claiming indemnity or contribution with respect to a settlement made by General Electric Company with an injured employee, and the survivor and personal representative of a deceased employee, of the United States.

The United States District Court for the District of Maryland had jurisdiction over the suit against the United States by virtue of 28 U.S.C. § 1346(b); over the suit against the individual Respondents by virtue of 28 U.S.C. § 1332.

The District Court granted a Motion to Dismiss in favor of the United States. The Court found the United States immune from suit. It analogized the United States to a private person shielded by the Maryland Workmen's Compensation Act from third party actions for contribution and indemnity. The Court did not accept Petitioner's argument based on the actual wording of the Maryland Act which makes it inapplicable to Federal employees.

On the basis of affidavits the District Court granted a Motion for Summary Judgment in favor of the individual Respondents. The rationale for that decision was that *Barr v. Matteo*, 360 U.S. 564 (1950), granted government employees immunity from tort liability so long as the acts complained of are within the scope of the actor's duties. The Court concluded the allegedly negligent acts were within the scope of the employee's duties and thus granted them summary judgment. The Court refused to use as a yardstick whether the acts were "discretionary." Those rulings were affirmed by the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF FACTS

On July 27, 1982, James Layman and Lloyd Thompson, high-voltage electricians in the employ of the National Institute of Health, were sent to the Institute's Building 29 to replace burned-out resistors in a transformer designed and manufactured by General Electric Company. During their attempts to do so they shorted the transformer, which caused a surge of electric current accompanied by an arc which enveloped the two men and seriously injured them. Mr. Thompson died about a month after his injury. Mr. Layman remains alive but is permanently injured and disfigured.

A civil suit was filed in the United States District Court for the District of Maryland against General Electric Company by Mr. Thompson's representative and by Mr.

Layman and his wife to recover for injuries sustained by both men. It was alleged that the short-circuiting of the transformer could have been prevented by safety measures on the part of General Electric Company in the design and manufacture of the subject transformer. The suit was settled for a total of $2,000,000.00.

The present action was filed by General Electric Company against the United States under the Federal Tort Claims Act, and against five Federal employees under allegations of diversity jurisdiction. The suit alleged that by numerous negligent acts and omissions the Defendants failed to exercise due care to prevent the injuries to Mr. Layman and Mr. Thompson, as it was their duty to do.

The five individual Defendents, Respondents herein, are as follows:

Andrew W. Klassett, foreman of the National Institute of Health High Voltage Electrical Group, who was in charge of the high voltage electricians (including the two whose injuries gave rise to this action) who were responsible for the operation of the Institute's high voltage electrical distribution system.

Philip H. Welty, Jr., group leader and assistant foreman.

Thomas G. Vegella, whose duties were to assist the Division of Engineering services, as a safety and health consultant, in planning and adhering to the Institute's safety program.

John Anthony Vilgos, supervisory mechanical engineer of the Power Plant Section, responsible for overall direction and supervision of the plant staff.

Raymond Mullinix, general foreman of the Power Plant Section, who was the supervisor of the foreman, Andrew W. Klassett.

REASONS FOR GRANTING THE PETITION

1. THERE ARE CONFLICTS IN THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS RESPECTING THE QUESTION OF IMMUNITY OF INDIVIDUAL RESPONDENTS. ON THAT ACCOUNT, THIS COURT RECENTLY GRANTED A PETITION FOR WRIT OF CERTIORARI IN A CASE THAT IS ON THAT ISSUE OBVERSE TO THE CASE AT BAR.

On March 2, 1987, this Court granted a writ of certiorari pursuant to a petition filed by the Solicitor General of the United States on behalf of indivdual employees of the United States whose status in the case was the same as that of the individual Respondents herein *Rodney D. Westfall et al. v. William T. Erwin, Sr. and Emely Erwin*, in this Court, October Term 1986, No. 86-714.

In that case, the Solicitor General sought review of the case of *Erwin v. Westfall*, 785 F.2d 1551 (C.A. 11, 1986), where the United States Court of Appeals for the Eleventh Circuit held that such employees were not immune from suit if the acts complained of were not discretionary, and remanded the case to the United States District Court for the Northern District of Alabama to determine whether or not the acts in question were discretionary.

In the present case, Petitioner seeks review of the case of *General Electric Company v. United States et al.*, ___ F. 2d. ___ (C.A. 4, 1987), where, directly contrary to the holding of the Eleventh Circuit, the United States Court of Appeals for the Fourth Circuit held that the individual employees of the United States were immune from suit and that it is immaterial that the acts complained of were not discretionary.

The Solicitor General, in the petition for certiorari in the case of *Westfall v. Erwin*, points out at page 6 thereof that "[t]here is a sharp conflict among the courts of

appeals with respect to the scope of federal employees' immunity from liability in state law tort actions," and at pages 6 through 9 cites and discusses a number of such conflicting cases from the various circuits.

One of the cases cited by the Solicitor General therein is *Poolman v. Nelson*, 802 F.2d 304 (C.A. 8, 1986), which in footnote 2 at page 308, cites cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits which are consistent with the holding of *Erwin v. Westfall, supra,* that Federal employees are immune from suit only as to discretionary acts.

It is respectfully submitted that this Court should grant the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit herein petitioned for and hear this case together with the case of *Westfall v. Erwin, supra.*

In the alternative, it is requested the Court defer ruling on this Petition and, after a decision in *Westfall v. Erwin, supra,* to remand this case to the United States Court of Appeals for the Fourth Circuit for reconsideration.

2. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN HOLDING THE UNITED STATES IMMUNE FROM SUIT HEREIN.

Title 28, Section 2674, of the United States Code provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances . . . .*" (Emphasis added.)

The Court of Appeals herein totally disregards the emphasized words in the above-quoted statute, as well as the relevant Maryland law, in arriving at its decision that

the United States is immune from suit herein under the Maryland Workmen's Compensation Act.

The Maryland Workmen's Compensation Act, Annotated Code of Maryland, Article 101, Section 15, provides in pertinent part:

> "Every employer *subject to the provisions of this article*, shall pay or provide as required herein compensation . . .for the disability or death of his employee arising out of and in the course of his employment . . . .
>
> "The liability prescribed by the preceding paragraph is exclusive . . ." (Emphasis added.)

The United States is not an "employer subject to the provisions of this article." Therefore it is not immune from tort suit or suit for contribution or indemnity by a third-party tortfeasor pursuant to Section 15, *supra*. (The United States is immune from tort suit by one of its employees because such suit is not included in the waiver of sovereign immunity provided by the Federal Tort Claims Act, 28 U.S.C. Section 2674, quoted *supra*. *Lockheed Aircraft Corporation v. United States*, 460 U.S. 190, 193-4, 74 L. Ed. 2d 911, 197, 103 S. Ct. 1033 (1983). A suit for contribution or indemnity by a third-party tortfeasor, however, is permitted pursuant to the Federal Tort Claims Act, *Lockheed, supra,* 460 U.S. at 199, 74 L. Ed. 2d 920.)

Annotated Code of Maryland, Article 101, Section 67, provides in pertinent part:

> "Definitions are used in this article:
>
> * * * * * *
>
> (2) 'Employer' means those persons who fall within the requirements of § 21(a) of this article . . . "

Article 101, Section 21(a) provides in pertinent part:

> "The following shall constitute employers *subject to the provisions of this act:*
>
> (1) Every person that has in the State one or more employees *subject to this act.*" (Emphasis added.)

Section 21 further provides in pertinent part:

> "(b) *Coverage of employees.* — The following shall constitute employees *subject to the provisions of this act, except* as exempted under subsection (c) of this section . . . .
>
> "(c) *Exemptions.* — The following employees are exempt from the coverage of this act:
>
> (1) Any person employed for not exceeding 30 consecutive work days, to do . . . work in or about the private home of the employer . . . .
>
> (2) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.
>
> (3) Any person for whom a rule of liability for injury or death is provided by the laws of the United States.
>
> (4) Casual employees or any employees who are employed wholly without the State . . . .
>
> (5) Members of volunteer police departments, nonsalaried members of boards or commissions, volunteer workers for agencies or departments of any political subdivisions, volunteer civil defense members or trainees, members of volunteer fire departments and rescue squads in [certain] counties . . . .
>
> (6) Any person while riding in a vanpool . . . owned, leased, or operated by the employer in a ridesharing arrangement . . . .
>
> (7) Any person who is a licensed real estate salesperson or an associate real estate broker . . . remunerated on a commission basis only . . . ." (Emphasis added.)

None of the employers of employees in the categories set forth in Subsection (c)(1), (2), (4), (5), (6), and (7) is an employee "subject to the provisions of this article," therefore those employers are not liable for payment of workmen's compensation benefits, and are *not entitled to the immunity provided for the Section 15, supra, Wood v. Abel*, 268 Md. 214, 220, 300 A.2d 665 (1973), whether the suit is brought by an employee or for contribution or indemnity by a third-party tortfeasor. Nor can any of such employers obtain immunity by providing benefits *similar* to those provided by Article 101. It is not the provision of benefits, but being "subject to this article" which entitles an employer to immunity pursuant to Section 15, *supra*.

(An employer of employees as described in Subsection (c) may *become* "subject to the provisions of this article" pursuant to Section 31 thereof by joint election by it and its employees. The United States and its Maryland employees having made no such joint election, the United States has not hereby become "subject to the provisions of this article.")

The employer of employees described in Subsection (c)(3), however, all alone, is held by the Court of Appeals herein *to be entitled to immunity* from suit provided for in Section 15, *supra*, both as to suit brought by an employee and as to suit by a third party tortfeasor for contribution or indemnity, in spite of the fact that it clearly is not an employer "subject to the provisions of this article."

In so holding, the Court of Appeals herein violates the provisions of Section 2674 of Title 28, *supra*, which unequivocally mandates that the United States is to be held liable "in the same manner and to the same extent" that employers of employees as described in Subsection (c)(1), (2), (4), (5), (6), (7) may be held liable. Thus the United States is favored by the Court of Appeals with a special and privileged status not accorded to a "private individual under like circumstances."

Robinson v. United States, 408 F. Supp. 132, 136 (N.D. Ill., 1976), states:

> "Congress intended that the appropriate state law serve as the model for liabilities it consented to accept. . . . The government cannot be placed in a more favorable position than any other defendant under state law [such as the defendant in *Wood v. Abel, supra,* held liable in tort to an employee as described in Section 21(c)(4) of Article 101, *supra*]."

Moreover, the Court of Appeals herein arrived at its holding on the basis of Federal law, Maine law, Pennsylvania law, Kansas law — anything and everything *except* Maryland law, which is the *only* law that it was permitted to base its decision upon, according to this Court, which states in *Richards v. United States*, 369 U.S. 1, 9-11, 7 L. Ed. 2d 492, 498-9, 82 S. Ct. 585 (1962):

> "In the Tort Claims Act Congress has expressly stated that the government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred. . . . Thus, we conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of *the whole law of the State where the act or omission occurred.*" (Emphasis added.)

In summary, this Court in *Lockheed Aircraft Corporation v. United States, supra,* refused to permit the Federal Employee's Compensation Act to become a universal bar to third party indemnity actions arising from injuries to federal employees. The case at bar calls for an application and explanation of the *Lockheed Aircraft* holding in the context of a typical state statutory scheme of worker's compensation. The Courts below have, contrary to the general direction of *Lockheed Aircraft,* raised a universal bar to third party actions such as this one.

3. The United States Court of Appeals for the Fourth Circuit erred in holding the individual Respondents immune from suit herein.

There is one class of government employees, and one only, which is immune from suit for *negligent* acts committed within the scope of employment, namely: those whose acts are *discretionary* and within the context of *policy-making*.

This is a venerable principle of the law, one of the earliest pronouncements of it being set forth in *Wilkes v. Dinsman,* 7 Howard (48 U.S.) 89, 12 L. Ed. 618 (1849):

> ". . . the officer being intrusted with a *discretion for public purposes,* is not to be punished for the exercise of it. . . ." (Emphasis added.)

There is another equally venerable principle of law which is a corollary to that, and which seems first to have been set forth in *Tracy v. Swartout,* 10 Peters (35 U.S.) 80, 95, 9 L. Ed. 354 (1836):

> "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. . . . Where a ministerial officer acts in food faith, for an injury done, he can claim no further exemption, when his acts are clearly against law."

Thus a *ministerial* officer, or an employee carrying out *ministerial* duties or acts, has always been held liable for negligence in the performance of the same, and that has continued to be the law of the United States throughout the years down to the present day, as set forth, for example, in the cases following:

> *Garland v. Davis,* 4 Howard (45 U.S.) 131, 149, 11 L. Ed. 907 (1846):

> ". . . officers, not judicial, nor having any discretion to exercise on a subject . . . are liable in tort for misfeasance, whenever they are violations of public laws. . . ."

Cooper v. O'Connor, 105 F.2d 761, 763 (D.C. D.C., 1939):

> "There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign." *Sims v. United States,* 252 F.2d 434, 441 (C.A. 4, 1958):
>
> > "It is . . . generally true that a public officer engaged in *non-ministerial* duties will not be civilly liable for an act performed within the scope of his authority. . . ." (Emphasis added.)

Adden v. Middlebrooks, 688 F.2d 1147, 1152 (C.A. 7, 1982):

> "The distinction . . . between 'ministerial' and 'discretionary' acts has long been deemed relevant to whether a public officer is subject to liability as an individual. . . . The well settled rule is that a public officer is not individually liable for performance of a discretionary act but may be liable for nonfeasance of a ministerial act."

People of Three Mile Island v. Nuclear Regulatory Commission, 747 F.2d 139, 143 (C.A. 3, 1984):

> "Executive officers performing discretionary, *as opposed to ministerial,* functions are entitled to qualified immunity from suit." (Emphasis added.)

The United States Court of Appeals for the Fourth Circuit in this case wrapped the cloak of immunity around the individual respondents because they had not exceeded the bounds of their governmental authority (even though factually an issue exists whether they violated a National Institute of Health regulation by omission.) That is the approach the Solicitor General for the United States says

should be, but is not, the law in the Eleventh Circuit. Solicitor General's Petition for Certiorari, *Westfall v. Erwin*, page 12. Thus the extent of a federal employee's immunity turns not on uniform law, but geography. Additionally, in the case of the Fourth Circuit, the extent of a federal employee's immunity turns on an improper application of the guidelines of *Barr v. Matteo, supra* by refusing to consider whether the allegedly tortious acts did or did not involve appropriate exercises of discretion.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that the Court should issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for review of its judgment herein.

Respectfully submitted,

EDWARD C. MACKIE,
PATRICK G. CULLEN,
ROLLINS, SMALKIN, RICHARDS
& MACKIE,

401 North Charles Street,
Baltimore, Maryland 21201,
(301) 727-2443,

Attorneys for Petitioner.

NO. 86-2041

United States Court of Appeals For the Fourth Circuit

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA; ANDREW W. KLASSETT; PHILIP H. WELTY, JR.; THOMAS J. VEGELLA; RAYMOND MULLINIX AND JOHN ANTHONY VILGOS,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. JAMES R. MILLER, JR., DISTRICT JUDGE (CIVIL ACTION NO. M-84-3834)

ARGUED: NOVEMBER 10, 1986 DECIDED: MARCH 12, 1987

BEFORE RUSSELL AND HALL, CIRCUIT JUDGES, AND ROBERT G. DOUMAR, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, SITTING BY DESIGNATION.

EDWARD C. MACKIE (PATRICK G. CULLEN; ROLLINS, SMALKIN, RICHARDS MACKIE, ON BRIEF) FOR APPELLANT; RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL (BRECKINRIDGE L. WILLCOX, UNITED STATES ATTORNEY; JOHN F. CORDES, CARLENE V. MACINTYRE, APPELLATE STAFF ATTORNEYS, DEPARTMENT OF JUSTICE) FOR APPELLEES.

Per Curiam:

Two employees of the National Institutes of Health (NIH) were injured while repairing an electrical transformer manufactured by the General Electric Company (General Electric). One of the employees died as a result of his injuries. The surviving employee and the deceased employee's wife filed suit against General Electric on theories of negligence, breach of warranty and strict liability; this suit was ultimately settled. General Electric then filed a third-party action seeking to hold the United States and five individual defendants liable for indemnity and contribution on the theory that the defendants had negligently failed to promulgate or adhere to safety regulations applicable to electrical transformers.

The District Court dismissed the claim against the United States, and entered summary judgment in favor of the individual defendants. General Electric appealed those decisions. This Court hereby affirms the decision of the district court.

I

Factual Background and Proceedings Below

On July 27, 1982, James Layman and Lloyd Thompson, high-voltage electricians employed by NIH were injured by a short circuit while they were replacing transistors in a transformer designed and manufactured by General Electric. Mr. Thompson died of his injuries approximately one month later. Mr. Layman was permanently injured and disfigured.

As Thompson and Layman were injured in the course of their federal employment, they received workers' compensation benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101–8151. In addition, Thompson's wife and Layman and his wife filed suit against General Electric in the United States District Court in Maryland alleging that the injuries had been caused by the defective design of the trans-

formers. General Electric settled that suit and then brought the instant third-party action for indemnity and contribution against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, and against five individual NIH employees, alleging diversity jurisdiction. General Electric alleged that the United States, and the individual defendants, who are NIH supervisors and administrators, failed to exercise due care to ensure the safety of the injured employees, and that the injuries were a direct result of the negligence of the defendants.

On February 21, 1985, the District Court dismissed General Electric's claims against the United States on the grounds that state law, which governs in a case brought pursuant to the FTCA, precludes third-party actions for contribution or indemnity against a private employer that has provided compensation for its employees in accordance with the Maryland Workmen's Compensation Act.

On March 13, 1986, the District Court granted the individual defendants' motion for summary judgment. The District Court held that the individuals were "[g]overnment officials [who] are immune from civil tort suits arising out of events which are within the scope of their employment." Joint Appendix, at 254–55. The court held that the negligent acts alleged to have been committed by the individual defendants occurred within the scope of their government employment, Joint Appendix, at 268, and that the individual defendants therefore were not subject to common-law liability for their negligence.

General Electric appealed both decisions to this Court. We affirm.

II
Immunity of the United States

The District Court correctly held that the United States was immune from appellant's claims for con-

tribution and indemnity. General Electric's claim against the United States was brought pursuant to the FTCA. The FTCA is a limited waiver of sovereign immunity which grants the federal district courts exclusive jurisdiction over suits for money damages against the United States for "personal injury or death caused by the negligent act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Thus, as a general rule, the tort liability of the United States is determined by reference to the law of the state in which the act or omission occurred. The accident which was the basis of the original suit against General Electric occurred in Bethesda, Maryland; hence, Maryland law controls the liability of the United States for contribution or indemnity.

The District Court held that the United States would not have been liable under state law, because it was exempt from liability under the Maryland Workmen's Compensation Statute, Md. Ann. Code art. 101, §§ 1–102. The statute provides that employers who comply with its provisions for the compensation of injured employees and their dependents are not subject to common-law liability. *Id.* § 15. Should the employer fail to provide compensation in accordance with the statute, the injured employee or his legal representative may bring suit for the amount of compensation prescribed by statute or may seek an award of common-law damages. *Id.*

The question presented by these facts is whether a private employer, under like circumstances,[1] could be

[1] It should be noted that the statute uses the term "like circumstances", rather than "the same" or "identical" circumstances. Congress' choice of this term suggests to this Court that it is correct to draw an analogy between the United States' compliance with FECA, and a private em-

liable for contribution or indemnity under Maryland law. The United States complied with the FECA, the federal law that provides workers' compensation to federal employees. A similarly situated private employer, then, would not comply with FECA, but would comply with the state worker's compensation law. Thus, a private employer "in like circumstances" would have complied with the Maryland Workers' Compensation statute. *In Re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1028 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1994 (1986). A private employer that had contributed to the Maryland Worker's Compensation program would be entitled to invoke the exclusivity provision of that statute to bar third-party claims for contribution and/or indemnity like that advanced by General Electric. The statute provides, in pertinent part:

> Every employer subject to the provisions of this article, shall pay or provide as required herein compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury . . .
>
> The liability prescribed by the last preceding paragraph shall be exclusive, except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in this article, an injured employee or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this article, or to maintain an action in the court for damages on account of such injury.

---

ployer's compliance with the Maryland worker's compensation law. *See In Re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1028 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1994 (1986).

Md. Ann. Code art. 101, § 15. The effect of this provision is to make the complying employer immune from common-law suits for negligence, because "the Workmen's Compensation Act is a substitute for the employer's common-law liability for negligence, subject to his common law defenses, and creates an absolute, but limited, liability regardless of fault, such liability upon a conforming employer being exclusive." *Flood v. Merchants Mutual Insurance Co.*, 230 Md. 373, 187 A.2d 320, 322 (Md. 1963) (citations omitted).

Section 15 also prohibits a third party who was held liable to the injured employee from suing the employer for contribution. *Mason v. Callas Contractors, Inc.*, 494 F. Supp. 782, 784 (D. Md. 1980) (*citing Baltimore Transit Co. v. State*, 183 Md. 674, 39 A.2d 858 (Md. 1944)). In the latter case, the Maryland Court of Appeals prohibited the defendant from impleading the plaintiff's employer (the City of Baltimore) on the grounds that the employer's liability was limited by the exclusivity provision of the workers' compensation act and stated that "[t]he employer should not be held liable indirectly in an amount that could not be recovered directly, for this would run counter to one of the fundamental purposes of the compensation law." *Baltimore Transit Co.*, 39 A.2d at 861.

This Court finds that a similarly situated private employer would be immune from common law damage suits arising out of injuries negligently inflicted on its employees. The United States, by virtue of its compliance with the applicable worker's compensation law, FECA, is entitled to claim the same immunity.[2] To

---

[2] FECA's exclusivity provision, by its terms, does not bar third-party indemnity actions against the United States.[5] U.S.C. § 8116(c); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 195–96 (1983). The FTCA's limited waiver of sovereign immunity permits the maintenance of "third party claims against the government for losses incurred by third parties as the result of injuries to federal employees covered by FECA where other applicable substantive law

hold otherwise would be to place the United States in a position less favorable than that of any private employer under the Maryland Statute. It would be to allow the State of Maryland to compel the United States to comply with state workers' compensation law, which it lacks the power to do. *Gianuzzi v. Doninger Metal Products,* 585 F. Supp. 1306, 1309 (W.D. Pa. 1984). *See also Griffin v. United States,* 644 F.2d 846, 847 (10th Cir. 1981). Finally, it would discourage the United States from providing compensation for its injured employees and their dependants pursuant to the more generous FECA provisions.

III
Immunity of Individual Defendants

The appellant argues that the immunity of the individual defendants is determined by whether their functions can be characterized as "discretionary" or "ministerial."[3] In so doing, the appellant ignores the

---

grants a right of recovery." *In Re All Maine Asbestos Litigation,* 772 F.2d at 1027. The FTCA permits the United States to be held liable only to the same extent that a private party would be liable under like circumstances, and mandates the application of state substantive law to determine the extent of that liability. 28 U.S.C. §§ 1346(b), 2674. It is for this reason that the exclusivity provision of the Maryland statute, rather than that of FECA, applies to this case.

[3] The apellant contends that the official's immunity depends upon whether the official's act was "discretionary" or "ministerial." Brief of Apellant, at 8–11. To accept this contention would be to disregard the Supreme Court's statement that "[t]he privilege is not a badge or emolument of exalted office." *Barr,* 360 U.S. at 572. In *Barr,* the Court expressly stated that "[i]t is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision' . . .—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." *Id.* at 573–74 (citation omitted). The

well-established distinction between the executive official's absolute immunity from common-law tort liability, and qualified immunity from liability for constitutional torts.

Government officials enjoy varying degrees of immunity from liability for actions taken within the scope of their employment. The immunity of federal legislators is conferred by the Speech and Debate Clause of the United States Constitution. *Scheuer v. Rhodes,* 416 U.S. 232, 240 (1974); *Barr v. Matteo,* 360 U.S. 564, 569–70 (1959). The immunity of judicial and executive officers, however, was created and developed by the common law. *Scheuer,* 416 U.S. at 241; *Barr,* 360 U.S. at 569–70. With respect to an executive officer, the scope of the immunity is determined not only by the function of that official, but by the nature of the acts for which the plaintiff seeks to impose liability on that official.

According to the United States Supreme Court, the immunity enjoyed by high-ranking executive officials with substantial discretionary authority is far broader than that conferred upon officials of lower rank who have fewer occasions to exercise discretion in the normal course of their duties, *Barr,* 360 U.S. at 573, but is not restricted to discretionary rather than

---

Court concluded that "the fact that the action . . . taken was within the outer perimeter of [the official's] line of duty is enough to render the privilege applicable." *Id.* at 575. The Court recognized that the duties of a particular official may encompass discretionary and/or ministerial functions, *id.,* but did not thereby restrict the immunity to discretionary acts. *Id.* ("[T]he same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."). Thus, even if we were to accept appellant's contention that the individual defendants negligently discharged their ministerial, nondiscretionary functions, this would not resolve the immunity question now before us.

ministerial functions. *Id.* at 573–75. Rather, the immunity from suit applies to actions "within the outer perimeter of [the official's] line of duty." *Id.* at 575.

In *Barr,* the Supreme Court held that an executive official has absolute immunity for actions taken within the scope of his duties. In a subsequent case, *Butz v. Economou,* 438 U.S. 478 (1978), the Court held that this absolute immunity did not extend to acts alleged to be constitutional torts,[4] but that, as a general rule, executive officials charged with constitutional violations enjoy only a "qualified immunity" from damage liability. *Butz,* 438 U.S. at 508; *see also id.* at 507. The scope of the qualified immunity accorded to federal officials was the same as that accorded to state officials charged with constitutional violations by the Court's prior decision in *Scheuer,* where the Court held that such immunity was appropriate in cases in which the defendant official had had reasonable grounds for the action taken, as well as a good faith belief in the legality or constitutionality of the action taken. *Scheuer,* 416 U.S. at 247–48.[5]

The development of the more limited "qualified immunity" for defendant officials in constitutional tort suits is entirely consistent with the holding in *Barr*

---

[4] *Barr,* unlike *Butz,* did not discuss "[t]he liability of officials who have exceeded constitutional limits." *Id.* at 495. *See also id.,* at 495 n.22, ("We view this case, in its present posture, as concerned only with constitutional issues.").

[5] The Court subsequently clarified the standard for applying "good-faith immunity" in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), holding that the qualified immunity defense has both subjective and objective components, *id.* at 815, and that the defense is defeated if the defendant " '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . .' *Ibid.* (emphasis added)." *Id.*

that absolute immunity applies when the individual defendant is charged with a common-law tort. *Butz,* 438 U.S. at 507. It is clear that an act which an official knew or reasonably should have known, *Harlow,* 457 U.S. at 815, would violate the plaintiff's constitutional rights is not "within the outer perimeter of the [official's] line of duty." *Barr,* 360 U.S. at 575. A federal official derives his authority from the federal government, which in turn, enjoys only that measure of power conferred upon it by the Constitution of the United States. As a general rule, violation of the Constitution cannot normally be construed as action undertaken within a federal official's line of duty. Thus, there is no contradiction in the establishment of separate standards of immunity when common-law and constitutional torts are alleged. Indeed, this Court has construed the aforementioned Supreme Court cases as creating two separate standards of immunity. *Wallen v. Domm,* 700 F.2d 124, 126 (4th Cir. 1983) (granting absolute immunity to Veteran's Administration employee "since no constitutional violation is involved in this case, the activity complained of falls well within the limits of an absolute immunity claim."); *George v. Kay,* 632 F.2d 1103, 1105 (4th Cir. 1980) ("In *Butz,* the [Supreme] Court narrowed the scope of the privilege allowed in . . . *Barr,* holding that although government officials charged with tortious acts under state law are still allowed an absolute immunity privilege if the acts complained of were within the outer perimeter of their authority, those charged with unconstitutional acts are entitled only to a qualified immunity."), *cert. denied,* 450 U.S. 1029 (1981).

In the instant case, General Electric's claim for indemnity and contribution is founded on the alleged negligence of the individual defendants. Joint Appendix, at 10 ("The injuries to James Richard Layman and the injuries to and death of Lloyd F. Thompson were caused solely by the negligence of Defendant employees of the National Institutes of Health as aforesaid, without any negligence on the part of the

plaintiff thereunto contributing."). Recent Supreme Court case law clearly indicates that allegations of a defendant's negligence do not state constitutional claims against such a defendant. *Daniels v. Williams,* 106 S. Ct. 662 (1982); *Davidson v. Cannon,* 106 S. Ct. 668 (1986).[6] Federal officials may be held liable for constitutional torts to the same extent that state officials may be held liable for constitutional violations under § 1983. *Butz,* 438 U.S. at 503–04. Further, federal and state officials enjoy the same immunity from liability for constitutional torts. *Id.* at 504 ("[w]ithout congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."). Thus, we find that if an allegation of negligence does not state a cause of action against a state official under § 1983, then it also does not constitute an allegation that a federal official has

---

[6] In *Daniels v. Williams,* 106 S. Ct. 662 (1986), the Supreme Court overruled its holding in *Parratt v. Taylor,* 451 U.S. 527 (1981). In *Daniels,* an inmate sued a deputy sheriff to recover for injuries sustained when the inmate slipped on a pillow negligently left on the jail stairs by the defendant sheriff. The Fourth Circuit upheld the district court's entry of summary judgment for the defendant. The Supreme Court affirmed, holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels v. Williams,* 106 S. Ct. at 663. *Accord Davidson v. Cannon,* 106 S. Ct. 668 (1986). *Daniels* and *Davidson* were cases in which inmate plaintiffs brought suit against state prison officials pursuant to 42 U.S.C. § 1983, which provides in pertinent part,

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

committed a constitutional tort. Where no constitutional tort is alleged, the defendant official is absolutely immune from suits based on common-law torts, provided that the alleged tort was an action within the outer perimeter of the official's line of duty.

The District Court, applying the legal standard discussed above, determined that the alleged negligence of each of the individual defendants was within the outer perimeter of that defendant's line of duty. Joint Appendix, at 268. We hereby adopt the finding of the District Court, after a detailed inquiry into the job responsibilities of each of the individual defendants, that "[a]ll of the allegations speak to the individual defendants' duties of safely and properly maintaining the electrical functions of the NIH physical plant," and therefore "the negligence alleged to have been committed by [the individual defendants] occurred within the scope of their government employment." *Id.* Therefore, we conclude that the District Court properly granted summary judgment in favor of the individual defendants on the grounds of their absolute immunity from liability for common-law torts committed in the course of government employment.

We realize that application of the absolute immunity doctrine may give rise to harsh results. The Supreme Court has indicated, however, that the immunity doctrine attempts to strike a balance between "the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and . . . the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Barr,* 360 U.S. at 565. This balancing of "fundamentally antagonistic social policies" gives rise to "occasional instances of actual injustice which will go unredressed, but . . . that price [is] a necessary one to pay for the

greater good." *Id.* at 576. This Court has agreed. *Wallen v. Domm,* 700 F.2d at 126 ("It has been determined that the proper and effective administration of public affairs in general . . . outweighs redress of the occasional wrong caused by an official during activity otherwise within the official's authority." (citations omitted)).

Accordingly, the judgment of the District Court of Maryland dismissing the appellant's claims against the United States, and granting summary judgment in favor of the individual defendants, is hereby AFFIRMED.

Affirmed

NO. 86-2041

United States Court of Appeals For the Fourth Circuit

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA; ANDREW W. KLASSETT; PHILIP H. WELTY, JR.; THOMAS J. VEGELLA; RAYMOND MULLINIX AND JOHN ANTHONY VILGOS,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. JAMES R. MILLER, JR., DISTRICT JUDGE (CIVIL ACTION NO. M-84-3834)

ARGUED: NOVEMBER 10, 1986 DECIDED: MARCH 12, 1987

BEFORE RUSSELL AND HALL, CIRCUIT JUDGES, AND ROBERT G. DOUMAR, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, SITTING BY DESIGNATION.

EDWARD C. MACKIE (PATRICK G. CULLEN; ROLLINS, SMALKIN, RICHARDS MACKIE, ON BRIEF) FOR APPELLANT; RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL (BRECKINRIDGE L. WILLCOX, UNITED STATES ATTORNEY; JOHN F. CORDES, CARLENE V. MACINTYRE, APPELLATE STAFF ATTORNEYS, DEPARTMENT OF JUSTICE) FOR APPELLEES.

On March 12, 1987 this Court decided the case of *General Electric Company v. United States, et al,* No. 86-2041. On March 19, 1987, the appellees filed a Motion to Correct Opinion. That motion is hereby GRANTED, and the opinion is hereby amended as follows:

(1) On page one of the opinion, the spelling of government counsel's name is hereby changed from "MacIntyre" to "McIntyre;" and

(2) Footnote five of the opinion is hereby replaced with the following footnote:

> The Court subsequently clarified the standard for applying "good faith immunity" in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citations omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GENERAL ELECTRIC COMPANY v. UNITED STATES OF AMERICA, et al.	Civil Action No. M-84-3834

Memorandum and Order

General Electric Company filed the instant action against the United States, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680, alleging jurisdiction under 28 U.S.C. § 1346 (b), and against five federal employees individually for negligence, alleging diversity jurisdiction (Paper No. 1). All defendants have moved to dismiss the complaint in its entirety (Paper Nos. 5 & 8), and the plaintiff has responded (Paper Nos. 7 & 9). No hearing is necessary to decide the issues herein. Local Rule 6E.

Factual Background

On July 27, 1982, Mr. James Layman and Mr. Lloyd Thompson, employed by the National Institute of Health (NIH) as electricians, were sent to Building 29 at NIH to replace burned out resistors in a transformer designed and manufactured by General Electric (Paper No. 1, ¶¶ 10–11). While Layman and Thompson were working on the transformer, a short circuit occurred causing a surge of electric current accompanied by an arc which enveloped Thompson and Layman seriously injuring both of them (*id.* ¶¶ 12–14). Mr. Thompson died within one month of his injury. Mr. Layman remains alive but permanently injured and disfigured (*id.* ¶¶ 13–14).

A civil action against General Electric was filed in this court by Mr. Thompson's representative and by Mr. Layman and his wife to recover for the injuries sustained by both men. *See Thompson, et al. v. General Electric Co.,* No. M-83-1293. General Electric settled the claims of the plaintiffs in that action (Paper No. 1, ¶ 23).

In the present action, General Electric seeks contribution and indemnity from the United States and the five individual defendants. As to the United States, General Electric alleges that the United States, as the employer of Layman and Thompson, breached its duty to provide a safe work place for them (*id.* ¶ 17). Against the five federal employees, General Electric alleges that while acting in the scope of their employment, they failed to carry out their duties to use reasonable care for the safety of their fellow employees, specifically Mr. Layman and Mr. Thompson (*id.* ¶¶ 19–20).

The alleged breaches of duty on the part of both the United States and the five individual defendants are detailed in the complaint as:

> "a. Failure to provide and require the use of adequate protective clothing, including protective gloves, by personnel working with high voltage electric equipment.
>
> b. Failure to require that high voltage electrical equipment be de-energized when work was done on equipment which could be de-energized without interrupting service to the facility.
>
> c. Failure to require that the two components of the fuse assembly each be removed separately from the network protector.
>
> d. Failure to take measures to inspect and examine high voltage electrical equipment for possible modifications to make it safer for use.
>
> e. Failure to instruct adequately personnel respecting (i) the hazards of working with or coming

into contact with high voltage electrical equipment, (ii) the means of avoiding injury from such hazards, (iii) the use of the load side switch to de-energize the equipment, (iv) the safer method for installing fuse bars, (v) the construction of the network protector and (vi) the use of one hand rather than two as the safer technique for electricians to use.

f. Failure to implement and require personnel working with or coming into contact with high voltage electrical equipment to adhere to prescribed safety standards and regulations.

g. Failure to take other reasonable and necessary precautions against injury to personnel employed in working with or coming into contact with high voltage electrical equipment."

(*Id.* ¶¶ 18 and 20).

Legal Analysis

A. Is the United States Immune from this Suit under Maryland Workmen's Compensation Law?

The Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, is a limited waiver of the United States' sovereign immunity to suits in tort. *See United States v. Orleans*, 425 U.S. 807, 813 (1976). Pursuant to 28 U.S.C. § 1346, federal courts have exclusive jurisdiction for claims for money damages for negligence of employees of the United States, acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *see also* 28 U.S.C. § 2674.

Since the negligent acts or omissions alleged herein occurred in Maryland, Maryland law governs the

United States' liability in this case. *See, e.g., Richardson v. United States,* 369 U.S. 1, 8–9 (1962); *Garrett v. Jeffcoat,* 483 F.2d 590, 592 (4th Cir.), *cert. denied,* 414 U.S. 1071 (1973). The United States ". . . stands in the shoes of a private person in like circumstances . . ." for the purposes of liability. *Hunt v. United States,* 636 F.2d 580, 585 (D.C.Cir. 1980); *see also United States v. Muniz,* 374 U.S. 150, 153 (1963). If Maryland statutes immunize a private employer in like circumstances from suit, the United States is likewise shielded from liability in this action.

Under the Maryland Workmen's Compensation Act, "[e]very employer subject to the provisions of this article shall pay or provide . . . compensation according to the schedules of this article for disability or death of his employee arising out of . . . his employment . . ." *Md. Ann. Code,* Art. 101 § 15. If the employer secures compensation to his employees as set forth in § 16 of the Article 101,[1] his liability under the workmen's compensation laws "shall be exclusive. . . ." *Md. Code Ann.,* Art. 101 § 15. Thus, "the Workmen's Compensation Act is a substitute for the employer's common law liability for negligence." *Flood v. Merchants Insurance Co.,* 230 Md. 373, 377 (1962); *see also Knoche v. Cox,* 282 Md. 447, 452–53 (1978); *Baltimore Transit Co. v. State to Use of Schriefer,* 183 Md. 674, 677 (1944).

The exclusivity provision of Maryland law precludes liability of the employer for contribution, *see Mason v. Callas Contractors, Inc.,* 494 F. Supp. 782, 784 (D.Md. 1980) *citing Baltimore Transit Co. v. State,* 183 Md.

---

1 The employer shall secure compensation to his employees in one of the following ways:

(1) By insuring and keeping insured the payments of such compensation in the State Accident Fund, or

(2) By insuring and keeping insured the payments of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State.

674 (1944) or indemnity, *see American Radiator Corp. v. Mark Co.*, 230 Md. 584, 588–90 (1962).

The plaintiff argues, however, that the Maryland statute excludes some employers from its provisions and that those employers cannot take advantage of the exclusivity provisions of the statute even if they provide workmen's compensation to their injured employees.

Under the statute, "[t]he following shall constitute employers subject to the provisions of this Act: (1) Every person that has in the State one or more employees subject to this Act." *Md. Code Ann.*, Art. 101 § 21(a)(1). Seven classes of employees are exempted from coverage under the Act. *Md. Code Ann.*, Art. 101 § 21(c)(1–7). One of the groups exempted is "[a]ny person for whom a rule of liability for injury or death is provided by the laws of the United States." *Md. Ann. Code*, Art. 101 § 21(3). Obviously, then the United States does not have employees subject to the Act. The plaintiff argues that, as a result, the United States is not an employer subject to the Act and is, therefore, not immune from suit herein.

The plaintiff relies on *Keeney v. Beasman*, 169 Md. 582 (1936), to support its assertion that if an employee is exempted from the Act, even the employer's unilateral purchase of Workmen's Compensation insurance will not subject the employer to the Act and its protection.[2]

---

[2] In *Keeney v. Beasman*, the employee was injured and subsequently died from those injuries. His widow submitted a claim to the State Industrial Accident Commission. 169 Md. at 584. His employer had purchased an insurance policy from Maryland Casualty Co. under which the insurer agreed to pay promptly any person entitled to payment under the Workmen's Compensation Law. *Id.* at 589.

The issue before the court was whether the decedent, a dairy farm laborer, was entitled to payment. The court decided that because farm laborers were excluded from the statute, the decedent was not engaged in work covered by

Not cited by the plaintiff, but also relevant to the issue, is *Congressional Country Club, Inc. v. Baltimore & Ohio Railroad Co.*, 194 Md. 533 (1949). In that case, two employees of the Congressional Country Club [hereinafter the Club] were injured and one was killed when a bus owned by the Club and transporting them to work, collided with a train. *Id.* at 539. The injured passenger and the personal representatives of the deceased passengers filed suits against the Railroad. The Railroad notified the Club of the pendency of the suits and requested its participation in settlement. The Club declined to participate. The Railroad settled the claims and thereafter sued the Club for indemnity and contribution.

The Club defended on the basis that it was a conforming employer under the Workmen's Compensation Act and that its liability under the Act was exclusive. Whether the Club was entitled to that defense depended on whether the employees were covered by the Act. *Id.* at 541.

Because the Act extended liability to an employer, in this case, on the basis of extra-hazardous employment, the Club would have been liable to the employees for workmen's compensation under the Act only if their employment was found to be extra-hazardous. *Id.* The court found that the employees were not

---

the statute, and that the employer and his insurer could raise that fact as a defense to payment under the insurance policy. *Id.* at 589, 595.

Exempted employees could only be included under the statute, at that time, if there was a joint election by the employer and employee to be included and if the Industrial Accident Commission approved that joint election. *Id.* at 591. Those conditions had not been met in *Keeney*, and, therefore, his widow had no recourse under the statute.

After the decision in *Kenney*, the statute was amended to preclude the defense that an employee was not covered by the Act if the insurer had accepted payments on the workmen's compensation insurance policy. *Md. Code Ann.*, Art. 101 § 65.

engaged in extra-hazardous work, and, therefore, the Club was not liable to them for workmen's compensation under the Act. *Id.* at 542–43. The Club could have elected to insure employees in non-extra-hazardous work and thus become liable to them under the Act, but it chose not to do so. *Id.* at 544. Therefore, the Club was estopped from raising the defense of exclusivity in the suit brought by the Railroad for contribution and indemnity. *Id.* at 543. The trial court's award to the Railroad against the Club was accordingly affirmed. *Id.* at 545.

On the surface, *Keeney* and *Congressional Club* appear dispositive of the issue herein. In both cases the court looked to whether employees involved were exempted from the Act. In *Congressional Club,* the court found that because the employees were not covered by the Act, the employer could not shield itself behind the Act to preclude liability to a third party for contribution and indemnity. The critical fact in *Congressional Club,* however, was the fact that the employer, under the Act, could have insured the injured employees, *i.e.,* employees not engaged in extra-hazardous employment, by the joint election procedure set out in the Act, but the employer did not so do. Thus, it was held reasonable that that employer should not benefit from the protection of exclusivity in the Act.

The case at bar presents a different kind of problem. The United States has provided to its employees, through the Federal Employment Compensation Act, 5 U.S.C. § 8101, *et seq.,* a system whereby federal employees in Maryland may be compensated for their injuries. Those Maryland employees need not look to the Maryland Workmen's Compensation Act for coverage or compensation. Indeed, it appears that a state legislature "is without power to compel the federal government to participate in a state workmen's compensation program." *See Giannuzzi v. Doninger Metal Products,* 585 F. Supp. 1306, 1306 (W.D.Pa. 1984).

Thus, the plaintiff is arguing that, because the federal government did not make payments to the Maryland Workmen's Compensation system, but chose instead to provide coverage to its employees through a federal compensation system, it cannot be shielded from liability under the Maryland Workmen's Compensation Act. That argument relies on too technical a reading of the definition of employer in the Maryland Act.

In two recent decisions on this issue federal courts have considered, but have not found dispositive, the fact that federal employees are exempt from coverage in state workmen's compensation acts. In *Giannuzzi v. Doninger Metal Products, supra* at 1310, the court stated:

> "Congress enacted the Federal Employees Compensation Act to assist the federal government achieve its goal of becoming a 'model employer.' *See* S.Rep. No. 1081, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341. In a realistic sense, the Act is the government's 'answer to Workman's Compensation, . . . first enacted in Pennsylvania three years prior to the passage of the F.E.C.A.' *Lorenzetti v. United States,* 710 F.2d 982, 985 (3d Cir. 1983). That the federal program rather than the state program paid benefits to plaintiff is not significant. Because Pennsylvania law requires private employers to pay premiums to the workmen's compensation fund and because federal law requires the United States to be a private employer in tort case, it can be assumed for litigation purposes that the requirement of a 'quid pro quo' has been satisfied. We hold the fact that the federal government did not make payments to the Pennsylvania workmen's compensation fund does not affect the bar of state law in a tort suit against the United States as an employer."

Similarly, in *In re All Asbestos Cases,* No. 79-0382

(D.Hawaii, October 10, 1984) (Paper No. 5, Ex. 1), the court stated:

> "The FTCA provides that that the United States will only be liable as if a 'private person.' Therefore, provisions of workers' compensation statutes, such as § 903(a) (2) of the LHWCA, which exclude coverage of federal employees, are inapplicable in the analysis. Further, inviting this Court to analogize to a private party not covered by workers' compensation laws applicable to private parties would be to ask the Court to apply the principles of indemnity and contribution in a vacuum of substantive law. This is both infeasible and contrary to the intent of Congress in enacting the FTCA to determine liability in accordance with the law of the place where the act or omission occurred." *Id, slip op* at 23–24.

The Maryland Workmen's Compensation Act "should not be defeated by technical construction," *see Slacum v. Jolley*, 153 Md. 343, *passim* (1927), but should receive practical construction, *see, e.g., Rumple v. Henry H. Meyer Co., Inc.*, 208 Md. 350, 360(1955).

In all practical ways, the law of Maryland envisions that a private person who conforms to the Act by obtaining workmen's compensation insurance to cover his employees injured on the job shall be shielded from common law liability to the employee and liability to third parties on indemnity and contribution claims. In fact, private employers from outside the state are provided with the shield of immunity, in certain circumstances, if the out-of-state workman's compensation scheme covers the non-resident employee injured while on the job in Maryland.[3] *Md. Code Ann.*, Art. 101 § 21(4)

---

[3] The statute reads:

"An employee and his employer who are not residents of this State and whose contract of hire is entered into in another state shall be exempted from the provisions of this

In *Kelly v. Eclipse Motor Line,* 305 F. Supp. 191 (D.Md. 1969), Judge Kaufman decided that even though the Pennsylvania Workman's Compensation statute did not extend reciprocal extra territorial effect to the Maryland compensation law, the out-of-state employee who obtained compensation from his Pennsylvania employer in the Pennsylvania system could not sue that same employer in Maryland for negligence. *Id.* at 197-205. The Pennsylvania compensation award was the employee's exclusive remedy. *Id.* at 205.

It would be anomalous to allow out-of-state private employers to raise the bar of exclusivity and yet to deny that right to the federal government. Employees of both are exempt from the Act. If exclusivity applies to one, it logically should apply to the other.

It follows that the United States stands in the shoes of those private persons shielded by the Maryland Workmen's Compensation Act from direct actions and third party actions for contribution and indemnity. The motion to dismiss of the United States will be granted.

B. Are the Individual Defendants Absolutely Immune from Suit?

---

article while such employee is temporarily or intermittently within this State doing work for such nonresident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other state, so as to cover such employee's employment while in this State; provided the extraterritorial provisions of this article are recognized in such other state and provided employers and employees who are covered in this State are likewise exempted from the application of the workmen's compensation or similar laws of such other state. The benefits under the workmen's compensation act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this State." *Md. Code Ann.,* Art. 101 § 21(4).

The five individual defendants herein argue that they are absolutely immune from suit.

If the alleged tortious acts of federal employees were within the "outer perimeter of [their] line of duty" and were "an appropriate exercise of the discretion which an officer of [their] rank must possess if the public service is to function effectively," the employees are absolutely immune from common law tort liability. *Barr v. Matteo,* 360 U.S. 564, 575 (1958); *see also, Butz v. Economou,* 438 U.S. 478, 488 (1978).

The Fourth Circuit has "read *Barr* to extend absolute immunity to lower as well as upper level federal officials exercising discretion." *George v. Kay,* 632 F.2d 1103, 1105 (4th Cir. 1980). For federal employees, "[t]herefore, wrongful activity incidental to an otherwise proper exercise of authority must fall within the immunity claim." *Wallen v. Domm,* 700 F.2d 124, 126 (4th Cir. 1983).

Based on the allegations in the complaint, there is no dispute that these employees were acting within the outer perimeter of their lines of duty, but the plaintiff contends that the employees herein were not exercising discretionary duties, but solely ministerial ones.

A decision on whether the acts or omissions herein were an appropriate exercise of discretion requires a review of the duties of the five individual defendants.[4] There are no allegations in the complaint regarding those duties. Therefore, disposition of this issue on a motion to dismiss would be inappropriate.

---

[4] If in fact the acts or omissions alleged herein were performed by the five individual defendants as discretionary functions, the United States would not be liable to the plaintiff in this action. Under 28 U.S.C. § 2860(a) the provisions of the FTCA and 28 U.S.C. § 1346(b) are not applicable to "any claim . . . based upon the exercise or performance or failure to . . . perform a discretionary function. . . ."

Accordingly, it is this 21st day of February, 1985, by the United States District Court for the District of Maryland, ORDERED:

1) That the motion to dismiss of the United States is GRANTED.

2) That the motion to dismiss of the individual defendants is DENIED.

3) That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GENERAL ELECTRIC COMPANY v. ANDREW W. KLASSETT, et al.	Civil Action No. M-84-3834

MEMORANDUM AND ORDER

Plaintiff, the General Electric Company, filed suit on October 15, 1984, against the United States under the Federal Torts Claims Act, 28 U.S.C. §§ 2671–2680, alleging jurisdiction under 28 U.S.C. § 1346(b), and against five federal employees alleging diversity jurisdiction (Paper No. 1). General Electric alleged that the defendants had been negligent in failing to promulgate safety regulations relating to electrical transformers. As a result of this alleged negligence, two persons were seriously injured, one fatally, while working on an electrical transformer manufactured and designed by General Electric and sold to the National Institutes of Health (NIH). General Electric was sued and ultimately paid damages for the injuries through settlement of that case. General Electric, in the instant action, seeks to hold the defendants liable for their alleged negligence under indemnity and contribution theories (Paper No. 10 at 1).

On February 21, 1985, this court granted the motion of the United States to dismiss the action against it and denied the motion of the individual defendants to dismiss, *General Electric Co. v. United States*, 603 F. Supp. 881 (D.Md. 1985). Subsequently, the individual defendants filed a motion for summary judgment (Paper No. 16) and a motion to stay discovery pending the disposition of the summary judgment motion (Pa-

per No. 15). The plaintiff filed a response to both motions (Paper Nos. 18, 19). The defendants have also filed replies (Paper Nos. 20, 21). No hearing is needed to resolve this matter. Local Rule 6(G).

Motion to Dismiss

Factual Background

On July 27, 1982, James Layman and Lloyd Thompson, NIH electricians, were sent to Building 29 on the NIH grounds to replace burned out resistors in a transformer designed and manufactured by General Electric (Paper No. 1, ¶¶ 10–11). While they were repairing the transformer, it short circuited, causing a surge of electric current accompanied by an arc which enveloped the two men and seriously injured them (*id.*, ¶¶ 12–14). Mr. Thompson died about a month after his injury. Mr. Layman remains alive but is permanently injured and disfigured (*id.*, ¶¶ 13–14).

A civil suit against General Electric was filed in this court by Mr. Thompson's representative and by Mr Layman and his wife to recover for the injuries sustained by both men. *See Thompson, et al. v. General Electric Co.*, No. M-83-1293. General Electric settled the claims of the plaintiffs in that suit (Paper No. 11 at 2).

In the present suit, General Electric seeks $2 million in contribution and indemnity from the remaining individual defendants. The company alleges that the defendants, who are NIH administrators or supervisors, negligently failed to ensure the safety of the two injured men (Paper No. 16 at 6).

The defendants assert that they are entitled to absolute immunity in this action because they were acting within the outer perimeter of their workplace duty (Paper No. 16 at 7). They further assert that the defendants had discretion to entrust the two injured men who were "journeyman level expert electricians,

with the safe repair of the G.E. transformer." (*id.*). Finally, they assert as yet another basis for summary judgment Maryland law which states that supervisory personnel owe no actionable duty to their subordinates to provide a safe workplace (*id.* at 8).

Legal Analysis

In previously dismissing the plaintiff's claim against the United States, this court concluded it was inappropriate to dismiss the claim against the individual defendants absent a more complete description of their duties. 603 F. Supp. at 887.

Government officials are immune from civil tort suits arising out of events which are within the scope of their employment. *Barr v. Matteo,* 360 U.S. 564 (1959). The rationale behind this immunity is that those engaged in government service should not be deterred in the vigorous pursuit of their work by fear of civil liability.

> "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

Id. at 571. The immunity of a government official from civil suits extends to the "outer perimeter" of his or her "line of duty." *Id.* at 575.

The plaintiff argues that the question of whether a government official or employee is acting within the "line of duty" is not the sole inquiry to be made. In addition, it must be determined, says the plaintiff, whether the government worker was "exercising discretion with reference to a policy matter," in order to

ascertain if immunity is appropriate (Paper No. 19 at 9).

This court's reading of the *Barr* decision, however, indicates that no such restrictive interpretation of immunity was intended. The *Barr* case involved the director of the Federal Office of Rent Stabilization, a defendant whose position afforded him much discretion in his decision making, who was sued for libel by former employees of that office after he issued a press release criticizing their on-the-job conduct. 360 U.S. at 565–67. Although concluding that the defendant was immune from civil suit for what was clearly a discretionary act, the Court did not limit immunity to *only* that conduct.

> "That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, *for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts* at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."

Id. at 575 (additional emphasis supplied).

Accordingly, a government employee performing acts which are either discretionary or ministerial may be immune from civil liability. Consequently, discretion is not *the* factor which determines immunity, but *a* factor in measuring the scope of the "outer perimeter" of government duties within which immunity will be granted. Moreover, there is no "fixed" formula for determining where that outer perimeter lies and how correspondingly to assess claims of immunity.

> ". . . [T]he Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immu-

> nity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens. . . ."

Doe v. McMillan, 412 U.S. 306, 320 (1973).

While there is no "fixed" immunity formula, the *Barr* decision certainly offers guidelines. For example, the Court in *Barr* clearly indicates that as the level of responsibility in government employment rises, the amount of discretion available to the employee correspondingly increases. "[T]he occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions." *Id.* at 573. Thus, "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion it entails." *Id.* In short,

> "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity. . . ."

Id. at 573–74.[1] (Citation omitted).

The Fourth Circuit has had several opportunities to apply the holding of the *Barr* case. As a result, it is

---

[1] The Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978), narrowed the scope of the privilege outlined in the earlier *Barr* decision. In *Butz*, the Court held that while government officials charged with tortious conduct under state law would still enjoy absolute immunity if that conduct was within the scope of their authority, they would receive only qualified immunity when their conduct amounted to an unconstitutional act. *Id.* at 495. There is no indication in the instant case that the plaintiffs have committed any unconstitutional acts. Therefore, the absolute immunity of *Barr* is the controlling standard here.

evident in this circuit that the immunity outlined in the *Barr* decision is afforded to "lower as well as upper level federal officials exercising discretionary authority." *George v. Kay,* 632 F.2d 1103, 1105 (4th Cir. 1980), *cert. denied* 450 U.S. 1029 (1981). In the context of the *Barr* and *Doe* decisions, *George* must be read as an acknowledgment that even lower level employees must sometimes engage in discretionary acts on the job. When they do appropriately exercise discretionary responsibility, they too will be immune from liability just as they would be when they perform mandatory or ministerial functions. *George* also teaches that *Barr* immunity "is not tantamount to granting absolute license to (a federal official) to act as he chooses: the immunity is only absolute insofar as the acts complained of are within the scope of the official's authority."[2] *Id.*

In examining the decisions in this circuit, it appears to this court that the scope of activities falling within the *Barr* "outer perimeter" of the "line of duty" are extremely broad. For example, in *George v. Kay,* a postal inspector was immune from a defamation suit brought by a lawyer specializing in automobile accident cases and under investigation by the postal service for mail fraud. The attorney had claimed he was defamed by the inspector who told a third party the lawyer had staged accidents to collect insurance money. 632 F.2d at 1104. Because the complaint related to acts by the defendant "performed within the scope of his official duties as a postal inspector," the defendant "was entitled to an immunity defense as a matter of law." *Id.* at 1105.[3]

---

[2] The immunity is available as a defense to both intentional torts and negligence. *Wallen v. Domm,* 700 F.2d 124, 126 (4th Cir. 1983).

[3] The immunity defense has been raised with some regularity in the context of defamation actions. *See, e.g., Heine v. Raus,* 305 F. Supp. 816 (D.Md. 1969), *aff'd,* 432 F.2d 1007 (4th Cir. 1970), *cert. denied,* 402 U.S. 914 (1971)

Even an alleged assault has been considered within the scope of federal employment for the purposes of immunity from tort liability. In *Wallen v. Domm,* 700 F.2d 124 (4th Cir. 1983), the court upheld the granting of summary judgment in favor of the defendant, the chief of staff of a veterans' hospital, who in the course of a dispute with the plaintiff, the chief of the hospital's psychology services, over the quality of the plaintiff's work, allegedly assaulted him. 700 F.2d at 125. The court noted: "Few government officials are authorized to commit torts as a part of their line of duty, but to separate the activity that constitutes the wrong from its surrounding context—an otherwise proper exercise of authority—would effectively emasculate the immunity defense." *Id.* at 126.

In this district, the immunity defense established in the *Barr* decision has been closely followed as well. *See, e.g., Provenza v. Rinaudo,* 586 F. Supp. 1113 (D.Md. 1984) (Young, J.) (IRS officials immune from civil suit for a violation of common law right to privacy arising out of the issuance of a summons for the plaintiff's bank records); *Plourde v. Ferguson,* 519 F. Supp. 14 (D.Md. 1980) (Northrop, C.J.) (shoplifting suspect detained at the PX on air force base, subsequently arrested but acquitted, cannot sue in tort those federal employees who procured her prosecution because of their absolute immunity).

General Electric contends in this circuit that immunity has been granted in cases where the defendants

---

(summary judgment granted to CIA operative who asserted immunity from defamation suit brought by Estonian emigre after the operative told other emigres the Estonian was a Soviet KGB agent because the operative carried out the instructions of a superior officer acting within his discretion); *Holmes v. Eddy,* 341 F.2d 477 (4th Cir.), *cert. denied,* 382 U.S. 892 (1965) (affirming summary judgment for several Securities and Exchange Commission officials, who, while performing their duties, allegedly defamed corporation and its officials by circulating detrimental information about their business practices).

have been faced with a type of "lesser-of-two-evils" test and that the defendants must have been responsible for making a choice, *i.e.*, exercising discretion, which established a "policy." Analyzing the cases cited by the defendants in their motion for summary judgment,[4] General Electric states, "in *every case,* the alternative presented was either causing *harm to the plaintiff,* or, in the view of the defendant, *causing or permitting harm to someone else.* Thus, a decision of policy was inevitable." (Paper No. 19 at 11).

While that observation may be correct, in no instance did the courts of this circuit alter the *Barr* standard. Any analysis by the courts of the so-called policy dilemmas faced by the defendants in these seven decisions—all of whom were found to be immune from tort liability—was done in order to determine whether the discretion exercised by the defendant to address the dilemma was within his scope of employment. *See, e.g., Plourde v. Ferguson,* 519 F. Supp. at 18.

Perhaps the case which best articulates this is *Grossman v. McKay.* In *Grossman,* the defendant, an NIH employee development specialist, was sued for the alleged defamatory statements she made about a shorthand course known as "Quickhand," which the plaintiff was offering to government employees. 384 F. Supp. at 100. The defendant had the responsibility, as part of her duties, to investigate the abilities of non-governmental training agencies, to evaluate them, and to share these evaluative findings with other governmental training professionals. *Id.* at 110–111. After receiving a letter about the merits of the course, the defendant contacted a representative of the plaintiff for further information. In the pursuit of references,

---

[4] Those cases are: *George v. Kay,* 632 F.2d at 1103; *Knueman v. Naranjo,* 378 F. Supp. at 104 (D.Md. 1974); *Heine v. Raus,* 305 F. Supp. at 816; *Bowman v. White,* 388 F.2d 756 (4th Cir. 1966); *Holmes v. Eddy,* 341 F.2d at 477; *Plourde v. Ferguson,* 519 F. Supp. at 14; and *Grossman v. McKay,* 384 F. Supp. 99 (D.Md. 1974).

the defendant received negative reports about the course. The defendant imparted this negative information to an official of another agency who, as a result, cancelled the plaintiff's contract to teach the course there. *Id.* at 101–102.

The plaintiff in *Grossman,* like General Electric here, contended that whether acts were ministerial or discretionary determined whether immunity was available. Because the defendant was "merely a government employee without discretionary powers" the plaintiff argued that immunity from tort liability was not available. *Id.* The court explicitly stated, however, that it was "not disposed to adopt these dual criteria for application of the doctrine" of immunity. *Id.* at 104. To do so, the court said, would violate the *Doe v. McMillan* mandate of a "discerning inquiry" into the defendant's professional role when examining immunity questions. *Id.*

The question which Judge Murray asked in *Grossman* was, "to whom does the immunity extend?" *Id.* at 103. In formulating a response, he stated:

> "The danger to be avoided, in this Court's opinion, is attributing talismanic significance to use of terms such as 'officer,' 'official' and 'hierarchy.' The critically pertinent principles which must be adduced from . . . *Barr* is that the policy of governmental freedom in the exercise of duties must not be and is not rendered impotent by the mere fact that one 'up on the hierarchial ladder' has for certain pragmatic reasons delegated the discharge for specific duties to subordinates."

Id. at 105. Therefore, in *Grossman* a subordinate government employee, whose professional role included both discretionary and ministerial duties, was found to be immune from civil liability when acting within the scope of her federal employment. *Id.* at 109–112.

The single question, then, in this case is whether the defendants' actions which gave rise to the litigation fall within the "outer perimeter" of their duties.

There are five individual defendants remaining in this suit. They are Andrew W. Klassett, foreman of the NIH High Voltage Electrical Group; Philip H. Welty, Jr., the group leader; Thomas J. Vegella, safety consultant for the NIH Division of Safety; Raymond Mullinix, general foreman of the power plant section; and John Anthony Vilgos, Supervisory Mechanical Engineer of the Power Plant Section (Paper No. 16 at 14–17). The complaint alleges the following:

> "20. The individual Defendants herein were negligent in that in carrying out their duties as aforesaid, they failed to use reasonable care for the safety of their fellow employees, including James Richard Layman and Lloyd F. Thompson. Said negligence consisted of, but was not limited to the following:
>
> a. Failure to provide and require the use of adequate protective clothing, including protective gloves, by personnel working with high voltage electrical (sic) equipment.
>
> b. Failure to require that high voltage electrical equipment be de-energized when work was done on equipment which could be de-energized without interrupting service to the facility.
>
> c. Failure to require that the two components of the fuse assembly each be removed separately from the network protector.
>
> d. Failure to take measures to inspect and examine high voltage electrical equipment for possible modifications to make it safer for use.
>
> e. Failure to instruct adequately personnel respecting (i) the hazards of working with or coming into contact with high voltage electrical equip-

ment, (ii) the means of avoiding injury from such hazards, (iii) the use of the load side switch to de-energize the equipment, (iv) the safer method for installing fuse bars, (v) the construction of the network protector and (vi) the use of one hand rather than two as the safer technique for electricians to use.

f. Failure to implement and require personnel working with or coming into contact with high voltage electrical equipment to adhere to prescribed safety standards and regulations.

g. Failure to take other reasonable and necessary precautions against injury to personnel employed in working with or coming into contact with high voltage electrical equipment."

(Paper No. 1 at ¶ 20).

This court observed when dismissing the United States as a defendant that, "based on the allegations in the complaint, there is no dispute that these employees were acting within the outer perimeter of their lines of duty. . . ." No documentation describing the duties of these employees was available at that time, however, and thus disposition of this matter as to these defendants did not seem appropriate. 603 F. Supp. at 887. The plaintiff at that time raised the discretionary/ministerial factor in determining immunity, but for reasons already presented here, that factor is not controlling.

Conducting a "discerning inquiry" into the professional roles of these defendants indicates through materials submitted by the defendants, the following: As foreman, Mr. Klassett was responsible, *inter alia,* for motivating the personnel under his supervision. He was in charge of the high voltage electricians (including the two whose injuries precipitated this suit) who were responsible for the operation and maintenance of NIH's high voltage electrical distri-

bution system. "He selects the individuals and assigns the tasks based upon (their) . . . capabilities. . . . He explains the work to be done, the methods and procedures to be followed and defines the quantity and quality expected. He instructs his personnel, as needed, on difficult work assignments and reviews their work while in progress and on completion. . . ." (Paper No. 16, Exh. 1, Attachment C at 2, ¶¶ 1–3).

The group leader, Mr. Welty, acted as the assistant foreman. "He passes on to the other electricians instructions received from the supervisor . . . works along with the other electricians setting the pace and demonstrates the proper work methods involved in accomplishing an assigned task. He makes sure that necessary materials, technical instructions and tools are available . . . (He) maintains a current knowledge of the NIH high voltage electrical systems and answers questions of other workers concerning proper procedures, policies, written instructions and other directives to be used to complete an assigned task. He inspects work while in progress . . . (and) assures that safety and housekeeping rules are followed." (*Id.*, Exh. 1, Attachment D at 2–3).

Mr. Vegella "was assigned to the Occupational Safety and Health Branch of the Division of Safety where he served as a safety and Health Consultant for the Division of Engineering Services (DES). His role was to assist DES in planning and adherence to the NIH Safety Program and to act as an advisory member of the DES Safety Committee. He at no time had any supervisory or training responsibilities over any DES personnel including high voltage electricians." (Paper No. 16, Exh. 2, Affidavit of W. Emmett Barkley, NIH Director of the Division of Safety, ¶ 5).

Mr. Vilgos runs the power plant section of NIH "responsible for overall direction and supervision of the plant staff of 70 boiler and air conditioning plant operators, electricians, incinerator operators and maintenance crew." (Paper No. 16, Exh. 1, Attachment

A at 2). In addition, Mr. Vilgos was considered "the NIH technical expert and specialist for central utilities plant operations and such functions as the NIH advisory authority relative to all operating problems concerning central utilities." (*Id.*).

Mr. Mullinix essentially supervised the foreman. He was responsible for directing and coordinating "the repair, alteration, operation and preventive maintenance program of all crafts. . . . (He also) supervises the performance of scheduled and recurring maintenance on all systems and equipment in the plant and on the high voltage distribution complex. . . ." (Paper No. 16, Exh. 1, Attachment B at II).

"The mission of the National Institutes of Health is to uncover new knowledge that will improve (the nation's) health. . . ." (Paper No. 16, Exh. 1, Affidavit of Edwin D. Becker, associate director for research services (and acting director of the division of engineering services at the time of the accident, at 1).

Four of the employees in question—Vilgos, Mullinix, Klassett and Welty—were under Dr. Becker's supervision in a division "responsible for the design, construction, maintenance and repair of the NIH physical plant," all of which is designed to further the overall NIH mission. *Id.* at 2.

Mr. Vegella, operated under the Division of Safety, which was established "to provide to NIH the technical guidance and support to assist management, supervisors and employees establish a safe and healthful work environment, provide protection against hazards present in the workplace, train and motivate employees to recognize hazardous situations, to select appropriate control measures and safeguards and to put them into practice." (Paper No. 16, Exh. 2, Affidavit of W. Emmett Barkley, director of the division of safety at ¶ 3).

In a motion for summary judgment, the burden is on the moving party to show there is no dispute as to (a) the material facts as presented and (b) the legal

conclusions to be drawn from those facts. *Carroll v. United Steelworkers of America,* 498 F. Supp. 976, 978 (D.Md.), *aff'd,* 639 F.2d 778 (4th Cir. 1980). If this burden is met, then in order to preclude the entry of summary judgment pursuant to Fed. R. Civ. P. 56(e), the adverse party "must set forth specific facts showing that there is a genuine issue for trial."

The defendants have presented evidence which confirms what appeared to be the case from reading the allegations in the complaint—that the negligence alleged to have been committed by them occurred within the scope of their government employment. All of the allegations speak to their duties of safety and properly maintaining the electrical functions of the NIH physical plant (Paper No. 1, ¶ 20).

The evidence submitted by General Electric in opposition to the defendants' motion addresses the issue of the defendants' discretion. (*See* Paper No. 19, Attached deposition testimony and NIH Division of Engineering Instruction Manual). For reasons already stated, an inquiry into the defendants' exercise of discretion is relevant only in determining whether they acted within the "outer perimeter" of their duties. Since the unchallenged evidence is that the defendants acted within the scope of their employment to further the goals of their government employer, the defendants' motion for summary judgment will be granted even if it is assumed that one or more of them performed their duties negligently.

The plaintiff's contention that the defendants owed a duty under Maryland law to provide a safe work place to the injured employees is not relevant to the disposition of this matter because of this court's finding that the defendants are immune from liability in this action.

Motion for a Protective Order

The defendants' motion for a stay of discovery pending disposition of this motion (Paper No. 15) is hereby declared moot.

Accordingly, it is this 13th day of March, 1986, in the United States District Court of the District of Maryland, ORDERED:

1. That the defendants' motion for summary judgment is hereby GRANTED.

2. That the defendants' motion for a stay of discovery is hereby MOOT.

3. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GENERAL ELECTRIC COMPANY vs. UNITED STATES OF AMERICA AND ANDREW W. KLASSETT AND PHILIP H. WELTY, JR. AND THOMAS J. VEGELLA AND RAYMOND MULLINIX AND JOHN ANTHONY VILGOS	Civil Action No. M-84-3834

In accordance with the Memorandum and Order dated March 13, 1986 filed in the above entitled case, it is ORDERED and ADJUDGED: that the Defendant's motion for summary judgment is hereby GRANTED and that the Defendants' motion for a stay of discovery is hereby MOOT.

J U D G M E N T
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GENERAL ELECTRIC COMPANY,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA AND ANDREW W. KLASSETT AND PHILIP H. WELTY, JR. AND THOMAS J. VEGELLA AND RAYMOND MULLINIX AND JOHN ANTHONY VILGOS,

Defendant-Appelees,

No. 86-2041

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

§ 15. Duties of employers; injuries not included, etc.

Every employer subject to the provisions of this article, shall pay or provide as required herein compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as cause of such injury, except where the injury is occasioned by willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty or solely from the effect upon him of any narcotic, depressant, stimulant, hallucinogenic or hypnotic drug or from the effect upon him of any other drug which renders him incapable of satisfactorily performing his job except when such drug has been administered or taken in accordance with a physician's prescription. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty or solely from the effect upon him of any narcotic, depressant, stimulant, hallucinogenic or hypnotic drug or from the effect upon him of any other drug which renders him incapable of satisfactorily performing his job, neither the injured employee nor any dependent of such employee shall receive compensation under this article.

The liability prescribed by the last preceding paragraph shall be exclusive, except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in this article, an injured employee or his legal representative in case death results from the injury, may,

at his option, elect to claim compensation under this article, or to maintain an action in the courts for damages on account of such injury; and in such an action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. If an employer, besides employing workmen in extra-hazardous employment within the meaning of this article, shall also employ workmen in employments not extra-hazardous, the provisions of this article shall apply only to the extra-hazardous employments within the meaning of this article and the workmen employed therein, except as provided in § 31 of this article. (An. Code, 1951, § 14; 1939, § 14; 1924, § 14; 1914, ch. 800, § 14; 1916, ch. 597, § 14; 1972, ch. 300.)

APPLICATION OF ARTICLE

§ 21. Employers and employees subject to article; exemptions.

(a) *Coverage of employers.*—The following shall constitute employers subject to the provisions of this act:

(1) Every person that has in the State one or more employees subject to this act.

(2) The State, any agency thereof, and each county, city, town, township, incorporated village, school district, sewer district, drainage district, public or quasi-public corporation, or any other political subdivision of the State that has one or more employees subject to this act.

(b) *Coverage of employees.*—The following shall constitute employees subject to the provisions of this act, except as exempted under subsection (c) of this section:

(1) Every person, including a person under eighteen years of age, whether lawfully or unlawfully employed,

in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer.

(2) Every officer of a corporation rendering services for the corporation for monetary remuneration except:

(i) An officer of a close corporation, as defined in the Corporations and Associations Article, electing not to be covered under the provision of § 67 (4) of this article;

(ii) An officer owning 20 percent or more of the outstanding capital stock of a farm corporation electing not to be covered under the provisions of § 67 (4) of this article. For purposes of this subparagraph (ii) a farm corporation is defined as a corporation that derives at least 75 percent of its income from farm operations; or

(iii) An officer owning 20 percent or more of the outstanding capital stock of a professional services corporation (and performing professional services for that corporation as defined in the Corporations and Associations Article), electing not to be covered under the provisions of § 67 (4) of this article.

(3) Any employer, partner or sole proprietor electing coverage under the provisions of § 67 (4) of this article.

(4) Every person in the service of any political subdivision or agency thereof, under any contract of hire, express or implied, and every official or officer thereof, whether elected or appointed, while performing his official duties. Except as provided in subsection 21 (c) (5) of this act, every person who is a member of a volunteer fire or rescue squad or police department shall be deemed for the purpose of this act, to be in the employment of the political subdivision of the State where the department is organized. Except as provided in subsection 21 (c) (5) of this act, every person who is a regularly enrolled volunteer member or trainee of

the civil defense corps of this State as established under the Maryland Civil Defense Act shall be deemed, for the purposes of this act, to be in the employment of the State.

(5) Every person performing services for remuneration in the course of the trade, business, profession or occupation of an employer at the time of the injury, provided such person in relation to this service does not maintain a separate business, does not hold himself out to and render service to the public and not himself an employer subject to this act.

(6) Subject to the provisions of this section, every person regularly selling or distributing newspapers on the street or to customers at their homes or places of business. For the purposes of this act, such person shall be deemed an employee of any independent news agency for whom he shall sell newspapers, or of each publisher who engages such persons to sell or distribute its newspapers.

(7) Any person who is an apprentice, trainee, or retrainee, who is regularly employed, while receiving training or instruction outside of regular working hours so long as the training or instruction is related to his employment.

(8) Any person receiving remuneration from a farmer or a dairy farmer for services performed, other than office work, and including, by way of illustration and not by way of limitation, the operation of any machinery connected with any phase of soil, crop or animal management, construction and repairs of machinery and fixtures, and the handling of any crops or animals with or without machinery whether or not performed by a seasonal or migratory farm laborer.

(i) For the purposes of this section, a farmer is defined as one who has three (3) or more full-time employees or who has a yearly payroll for his full-time employees of at least fifteen thousand dollars ($15,000).

(ii) For purposes of this section, "seasonal or migratory farm laborer" means a person who is engaged in agricultural employment of a seasonal or other temporary nature and who is either (a) absent overnight from his permanent place of residence or (b) transported or caused to be transported to and from the place of employment by means of a day-haul operation.

(iii) For purposes of this section, "seasonal or migratory farm laborer" shall not include any person who:

A. Is employed within a 25-mile radius of his or her permanent place of residence and for not more than 13 weeks per year; and B. Does not operate machinery or equipment.

(9) Any person employed as a domestic servant in a private home who earns $250 or more in cash in any calendar quarter from any single household.

(10) Student teachers and student interns as provided in § 6-108 of the Education Article.

(11) Any person on jury duty in a nonfederal court in this State shall be deemed an employee of the State for the purposes of workmen's compensation. The juror's per diem for jury duty shall be the basis for compensation. The State shall pay into the State Accident Fund such premiums as may be determined by the Commissioners of the fund to be necessary to provide workmen's compensation coverage for jurors.

(c) *Exemptions.*—The following employees are exempt from the coverage of this act:

(1) Any person employed for not exceeding 30 consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or, if the employer has no other employees subject to this act, in or about the premises where such employer carries on his trade, business or profession.

(2) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(3) Any person for whom a rule of liability for injury or death is provided by the laws of the United States.

(4) Casual employees or any employees who are employed wholly without the State, except that for all purposes of this article, casual, occasional or incidental employments outside of this State by the Maryland employer of an employee or employees regularly employed by said employer within this State shall be construed to be employment within this State, and except that if a contract of employment is entered into in this State for work to be done entirely outside of the United States, this State shall have jurisdiction over work-related injuries or occupational diseases. If an employee or the dependents of an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article.

An employee and his employer who are not residents of this State and whose contract of hire is entered into in another state shall be exempted from the provisions of this article while such employee is temporarily or intermittently within this State doing work for such nonresident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other state, so as to cover such employee's employment while in this State; provided the extraterritorial provisions of this article are recognized in such other state and provided employers and employees who are covered in this State are likewise exempted from the application of the workmen's compensation or similar laws of such other state. The benefits under the workmen's compensation act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not,

received by such employee while working for such employer in this State.

A certificate from the duly authorized officer of the industrial accident commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extra-territorial coverage insuring his employees while working within this State shall be prima facie evidence that such employer carries such compensation insurance.

(5) Members of volunteer police departments, non-salaried members of boards or commissions, volunteer workers for agencies or departments of any political subdivisions, volunteer civil defense members or trainees, members of volunteer fire departments and rescue squads in the following counties: Allegany, Carroll, Cecil, Charles, Frederick, Garrett, Queen Anne's, St. Mary's, Somerset, Washington, and Worcester counties. In Washington County, members of volunteer fire departments and rescue squads may be covered under § 34 (e) of this article. In Worcester County, members of volunteer fire departments and rescue squads may be covered under § 34 (f) of this article.

(6) Any person while riding in a vanpool, as defined in § 11-175.1 (a) of the Transportation Article, owned, leased, or operated by the employer in a ridesharing arrangement, as defined in § 11-150.1 of the Transportation Article, between their place of residence and their place of employment, provided that the vanpool is insured as provided in § 13-422 of the Transportation Article and that this exemption shall not apply to any employee who, as part of that employee's employment duties for the employer, drives or operates such a vehicle.

(7) Any person who is a licensed real estate salesperson or an associate real estate broker, affiliated with a licensed real estate broker, under a written agreement, remunerated on a commission only basis,

and who qualifies as an independent contractor for federal tax purposes.

§ 31. Acceptance of article by employers and employees engaged in employments not within article; application of article to employers and employees in interstate and foreign commerce.

Any employer, his employee or employees engaged in works not within the meaning of this article, may by their joint election, filed with the Commission, accept the provision of this article and such acceptances when approved by the Commission, shall subject them to the provisions of this article to all intents and purposes as if they had been originally included in its terms.

Any workman of the age of sixteen years and upwards may himself exercise the election hereby authorized. The right of election hereby authorized shall be exercised on behalf of any workman under the age of sixteen years by his parent or guardian.

The provisions of this article shall apply to employers and employees engaged in intrastate and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen only in this State may, with the approval of the Commission, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this article by filing written acceptance with the Commission, which shall subject the acceptors to the provisions of this article to all intents and purposes as if they had been originally included in its terms. (An. Code, 1951, § 30;

1939, § 44; 1924, § 33; 1914, ch. 800 § 33; 1927, ch. 656; 1945, ch. 528; 1970, ch. 741; 1971, ch. 119.)

§ 67. Definitions.

Definitions as used in this article:

(1) "*Employment*" means work or occupation described in § 21 of this article.

(2) "*Employer*" means those persons who fall within the requirements of § 21 (a) of this article including a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation employing workmen.

(3) "*Employee*" means those persons engaged in occupations as provided by § 21 of this article.

(4) *Sole proprietors, partners or corporate officers electing to become "employees".*—(i) If an employer is a partnership, or sole proprietorship, the employer may elect to include as an "employee" within the provisions of the act, any member of the partnership, or the owner of the sole proprietorship, devoting full time to the partnership or proprietorship business. In the event of an election, the employer shall serve upon the employer's insurance carrier and upon the Commission written notice naming the persons to be covered and a proprietor or partner may not be an employee within this article until the notice has been served.

(ii) Any officer of a close corporation, as defined in the Corporations and Associations Article, or an officer owning 20 percent or more of the outstanding capital stock of a farm corporation, or an officer owning 20 percent or more of the outstanding capital stock of a professional services corporation (and performing professional services for that corporation), as defined in the Corporations and Associations Article, may

elect to become exempt from coverage as an employee under the provisions of § 21 (b) of this article. In the event of such an election, the employer shall serve upon the employer's insurance carrier and upon the Commission written notice naming the persons electing not to be covered, and every officer of a close corporation shall be an employee within this article until such notice has been served.

(5) *"Compensation"* means the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided therein.

(6) *"Injury," "personal injury," "accidental injury"* and *"accidental personal injury"* means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom, including frostbite and sunstroke resulting from weather condition, occupational disease and includes an injury caused by the wilful or negligent act of a third person directed against an employee in the course of his employment. Compensation may not be denied to an employee because of the degree of risk associated with the employment.

(7) *"Death"* when mentioned as a basis for the right to compensation means only dedath resulting from such injury or occupational disease.

(8) *"Average weekly wages"* for the purposes of this article shall be taken to mean the average weekly wages earned by an employee when working on full time, and shall include tips and the reasonable value of board, rent, housing, lodging or similar advantages received from an employer, and if any employee shall receive wages paid in part by his employer and in part by the United States under any veterans' benefit law enacted by Congress, the term "average weekly wages" shall mean the total average weekly wages from both sources earned by such an employee when working full time.

(9) *"State Accident Fund"* means the State Insurance Fund provided for in § 70 of this article.

(10) The Term *"child"* and *"children"* shall include posthumous children, adopted children, stepchildren, illegitimate children and other children.

(11) *"Beneficiary"* means a husband, wife, child, children or dependents of an employee in whom shall vest a right to receive payments under this article.

(12) *"Mining"* means all underground workings by shaft, drift, slope or otherwise, for the securing, removing, and taking out from under the ground, coal, iron, ore, clays and all other minerals and mineral substances, found in and under the earth, and shall mean all work done by any miner or employee working in and about said mines in said shafts, slopes, headings, tunnels, rooms and other subterranean places therein, for the purpose of obtaining and removing therefrom all such minerals and mineral substances, and the benefits of this article shall be extended to any employee, or in case of his death, to his dependent relatives, otherwise entitled, who shall be killed or injured while so working or employed therein, and such mine worker shall be deemed to be wholly employed in the State of Maryland, and entitled to the benefits of this article, if the tipple, mouth or principal mine entrance in and about which he works, is situated in this State, notwithstanding such shaft, heading, slope or other subterranean tunnel may extend underground into an adjoining state, and notwithstanding such mine worker so employed in this State may be killed or injured while working in said mine beyond the lines of this State, and within the lines of an adjoining state.

(13) *"Occupational disease"* as used in this article shall mean the event of an employee's becoming actually incapacitated, either temporarily, partially or totally, because of a disease contracted as the result of and in the course of employment, as provided in § 22 of this article.

(14) Whenever used in this article *"silicosis"* shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide (Si O_2) dust; and *"asbestosis"* shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust.

(15) *"Disablement,"* as used in § 22 of this article means the event of an employee's becoming actually incapacitated, either partly or totally, because of an occupational disease, from performing his work in the last occupation in which exposed to the hazards of such disease; and *"disability"* means the state of being so incapacitated. Disablement and disability in cases involving occupational diseases shall be determined by the Workmen's Compensation Commission as herein provided in this article.